DARUS v. PUBLIC PROSECUTOR

[A.Cr.J. (Hepworth J.) July 1, 1964]

[Alor Star — Criminal Appeal No. 62 of 1964]

Criminal Procedure — Police supervisee — Failure to report himself once a month to police — "Shall.... be liable to imprisonment for one year" — Criminal Procedure Code (Cap. 6), ss. 296 and 297.

The term of imprisonment of one year under section 297 of the Criminal Procedure Code is a maximum sentence and any lesser term may be imposed as is considered appropriate to the circumstances of the particular case.

Cases referred to:—

(1) *Public Prosecutor* v. *Man bin Ismail* [1939] M.L.J. 207.

(2) *Public Prosecutor* v. *Lee Ah Sam* [1949] M.L.J. 236.

(3) *Ng Chwee Puan* v. *Reg.* [1953] M.L.J. 86.

(4) *Khor Seek Pok* v. *Public Prosecutor* [1958] M.L.J. 170

CRIMINAL APPEAL.

G. N. Christie for the appellant.

Wan Ismail bin Wan Mohd. Salleh (Deputy Public Prosecutor) for the respondent.

Hepworth J.: The appellant was charged in the Magistrate's Court, Yen, Kedah, with an offence under section 297 of the Criminal Procedure Code in that he, being a person subject to the supervision of the police, did fail to comply with the requisitions of section 296 of the Criminal Procedure Code in that he failed to report himself once in each month to the officer-in-charge of Sungei Limau Dalam Police Station, Yen. The appellant pleaded guilty to the charge and was sentenced to one year's imprisonment with effect from the date of arrest.

The appellant appealed against the sentence of one year's imprisonment on the ground that not only was this sentence manifestly excessive but that the learned magistrate had misdirected himself in law in holding that this sentence was a minimum and mandatory. The learned magistrate stated in his grounds of judgment that as the sentence of one year's imprisonment under section 297 of the Criminal Procedure Code was mandatory he had no other alternative.

The operative part of section 297 states that a person committing an offence under that section "shall....be liable to imprisonment for one year."

In *Public Prosecutor* v. *Man bin Ismail* (1) Aitken J. held that the words "shall be liable to" give the court an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the case under and in accordance with the probationary provisions of section 294 of the Criminal Procedure Code.

In *Public Prosecutor* v. *Lee Ah Sam* (2) the Court of Appeal held that the words "shall be liable to" show the maximum extent to which a person convicted can be sentenced.

In *Ng Chwee Puan* v. *Reg.*(3) Brown J. held that the word "liable" contains no obligatory or mandatory connotation.

In *Khor Seek Pok* v. *Public Prosecutor* (4) Rigby J. after referring with approval to the case of *Ng Chwee Puan* v. *Reg.*, held that the words "liable on conviction to a fine of $10,000" gave the court a discretion to impose a fine of any sum within the maximum amount of $10,000.

It is clear therefore that the term of imprisonment of one year under section 297 of the Criminal Procedure Code is a maximum and that any lesser term may be imposed as is considered appropriate to the circumstances of the particular case.

From reading the record and the learned magistrate's grounds of judgment I got the impression that had the learned magistrate realised that imprisonment for one year was a maximum and was not mandatory, he would have awarded some lesser punishment. Accordingly I confirmed the conviction and varied the sentence to one of six months' imprisonment.

Conviction confirmed. Sentence varied.

CHIN KEOW v. GOVERNMENT OF THE FEDERATION OF MALAYA & ANOR.

[O.C.J. (Ong J.) July 2, 1964]

[K.L. — Civil Suit No. 342 of 1962]

Negligence — Professional negligence — Medical practitioner prescribing penicillin injection without inquiry whether patient was allergic — Hypersensitivity of patient — Death arising — Standard of care required — Forseeability.

A medical practitioner who prescribes penicillin injection for a patient without inquiring about the latter's reaction to it is not exercising the standard of care required of an ordinary man practising that particular profession and accordingly is guilty of negligence.

Cases referred to:—

(1) *In re Garnett* L.R. 31 Ch. D. 1, 9.

(2) *Plunkett* v. *Bull* (1915) 19 C.L.R. 544, 548-9.

(3) *Roe* v. *Minister of Health* [1954] 2 W.L.R. 915, 926.

(4) *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586.

(5) *Hunter* v. *Hanley* [1955] S.L.T. 213.

CIVIL SUIT.

P. G. Lim (Miss) for the plaintiff.

Au Ah Wah (Federal Counsel) for the defendants.

Ong J.: This is a claim by the dependants of a deceased person for damages under section 7 of the Civil Law Ordinance. The deceased had died of anaphylactic shock as the result of an injection of procaine penicillin and the plaintiff

alleges that the defendant doctor was negligent in prescribing the injection without making any prior inquiry from the patient, which would have revealed that she was allergic or hypersensitive to the drug.

The deceased, aged 25 years, was a female attendant employed in the Social Hygiene Clinic at Sultan Street, Kuala Lumpur, for over five years. In April 1958 she was treated for ear ache as an out-patient of the Pudu Road Government Clinic and on that occasion had been found "allergic to penicillin". Her out-patient treatment card had those three words of warning indorsed thereon in block letters. On April 7, 1960 she spoke to Mrs. Chan Tet Chin, the staff nurse at the clinic where they were both working, about an ulcer on her right ankle and swollen glands in the thigh. At about 10.30 a.m. the staff nurse brought the deceased to see the second defendant who was the medical officer in charge of the Social Hygiene Clinic at Sultan Street. He examined her.

What took place thereafter rested entirely on the evidence of the doctor and staff nurse. The only person who could testify against them was dead. Hence I thought that, where these two persons were seeking to throw the blame entirely on the deceased, it was salutary to remember the words of Brett M.R. in *In re Garnett*:[1]

"The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be first of all in a state of suspicion...."

A similar note of caution was voiced by Isaacs J. in the Australian case of *Plunkett* v. *Bull*.[2]

The staff nurse was called as a witness for the plaintiff and, in her evidence-in-chief, she said as follows:

"I gave her an injection of penicillin on 7.4.60. I was instructed by the medical officer, Dr. Devadason to give her an injection. At first the doctor asked me to give her sulphatetrad tablets. Then, when we were coming out of the doctor's office, she asked me what did doctor prescribe for her. I told her 'tablets' — not mentioning the name. Then she asked 'Why not give me injection instead of tablets?' So I took her in again to medical officer's office and told him she preferred injection. Then doctor said "Give her 2 c.c. procaine penicillin". So I gave her the injection. That was all the doctor said and all he did. He also instructed me to dress her leg."

Later, she continued:

"I had previously given this same patient procaine penicillin on instructions of Dr. Poulier in September 1955. I have no record — verbal instructions were given by the doctor to me. She was on staff of clinic and the injection was given for sore-throat. I had *not* told Dr. Devadason that she had been given procaine penicillin before. *She had told me that some people were allergic to penicillin, but she had spoken in general terms and did not mention herself.* I took no particular notice of her remarks."

In cross-examination, however, by Federal counsel on behalf of the Government, she said:

"When she said she wanted injection, she mentioned penicillin. I told the medical officer about it: 'She does not want tablet. She prefers penicillin injection'. He said: 'O.K., give her 2 c.c. procaine penicillin injection.'

She did not say a word about her allergy. She had never told me of her allergy. When Dr. Poulier prescribed penicillin for her I found no reaction."

Now, the deceased, according to the staff nurse, could understand English, but could not speak it. I thought that her evidence in cross-examination was inconsistent with her earlier evidence. Further, I thought it odd that the deceased herself should have specified penicillin, for five reasons. First, she was not English-speaking; secondly, if she had expressed her preference for "injections instead of tablets", *simpliciter*, as the staff-nurse said in the first place, it is plain that she could not have asked specifically for penicillin; thirdly, it is inconceivable that she could have remained in ignorance of her allergy discovered in 1958, and that she should, in the face of such warning, have asked for penicillin; fourthly, it seemed incredible that the deceased, holding a menial post, should have even known what to prescribe for herself and, all the more so, that she should have had the presumption to instruct the doctor on his own job; fifthly, I was not a little surprised that he allowed a patient to dictate to him, as it were, what she thought best for herself.

Being dissatisfied with the staff nurse's evidence, I asked her a few questions myself, to which her answers were as follows:

"Deceased was with me together when medical officer prescribed. She could hear it. She could understand what the medical officer said. When we were going out she asked me, in Chinese, 'Did doctor prescribe tablets or injection?' I said 'Tablets' only. I said 'Tablets or injection'. She said she preferred injection. I don't know why she had to ask me when she had heard and understood what the doctor had prescribed. I have no explanation. She knew the doctor well too."

Dr. Devadason's own version was as follows:

"I examined her. I prescribed sulphatetrad tablets or, as an alternative, penicillin injection. They both went away and staff nurse came back soon afterwards and told me that the amah preferred an injection of penicillin. The staff nurse had already given the amah penicillin some years ago, so I told the staff nurse she could give penicillin. The hospital assistant gave the injection."

I found it in the highest degree odd that the doctor should have "prescribed sulphatetrad tablets, or as an alternative, penicillin injection." I could not understand any necessity for prescribing these alternatives. He had penicillin available, and he must have had sulphatetrad tablets also. Nothing was said about the tablets being in short supply. Why, then, a prescription

in this extraordinary manner? Surely the decision must be his, not the patient's, nor one left to the choice of his nurse or assistant consulting their own convenience. The explanation was too fantastic for me to give it any credence. Of course there was no other way to pass the blame on to the deceased except to allege that the prescription was in the alternative and that the unfortunate woman herself made the choice. Were there no alternative, as alleged, the prescription of penicillin must be the inevitable conclusion. The nurse contradicted herself, and she and the doctor contradicted each other. As witnesses I believed neither of them.

I was satisfied, and I found as a fact, that sulphatetrad tablets were never prescribed by the doctor, that he prescribed a penicillin injection — and a penicillin injection only — as a routine treatment for the deceased, and that he did so prescribe without asking one single perfunctory question to attempt to discover whether she was sensitive to the drug. To leave no room for ambiguity, I am bound to say that I was also satisfied, and I found as a fact, that the deceased never prescribed for herself, or asked specifically for penicillin.

The only issue in this case was a very simple one, and that was why I had no hesitation in giving judgment for the plaintiff forthwith at the close of the trial. Was the doctor negligent when he failed to ask even one, or at most three, questions of his patient before he prescribed the injection? The first and most obvious question should have been: "Have you ever had penicillin before?" Other questions should logically follow according as the answer was in the affirmative or negative.

In coming to my decision I had not been unmindful of what Denning L.J. (as he then was) had said in *Roe* v. *Minister of Health*: [3]

"We should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure."

He had also said that "we must not look at the 1947 accident with 1954 spectacles", a remark of which McNair J. reminded the jury three years later in *Bolam* v. *Friern Hospital Management Committee*.[4] In this latter case the negligence test was stated by McNair J. on page 586, in these words:

"The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

In another passage of the judgment, at page 587 he continued:

"In a recent Scottish case, *Hunter* v. *Hanley*,[5] Lord President Clyde said: 'In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care'. If that statement of the true test is qualified by the words 'in all the circumstances,' Mr. Fox-Andrews would not seek to say that that expression of opinion does not accord with the English law. It is just a question of expression. I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."

Although the discovery of penicillin by Sir Alexander Fleming was made thirty-five years ago, its general use in this country has now gone on for nearly 20 years, and it is, I think, true to say that many an ordinary layman is aware that certain individuals are allergic and sensitive to this particular antibiotic, and that in certain cases its use had had fatal consequences. The defendant doctor in this case could not have been unaware of this possibility. Even granted that fatalities are comparatively rare, the consequences nevertheless were foreseeable, which distinguishes the instant case from the unfortunate mishap that caused spastic paraplegia to the two men in *Roe* v. *Minister of Health*. In my view the test of foreseeability was satisfied in the instant case, on the doctor's own admission. In cross-examination he said as follows:

"I had made no investigations into her history. Staff nurse had told me about her. I knew of the possibility of a person developing hypersensitivity to penicillin after having penicillin before. In such cases there was remote possibility of danger. Knowing that, I carried on because I had had no mishaps before. Hypersensitivity to a person could prove fatal.

I agree that Ex.1 is consistent with the doctor having been put on guard. Not as a rule do I give choice of treatment to the patient. I realise now — after the event — it was dangerous to have given the injection without the test."

It is to be observed that what Dr. Devadason sought to explain away was his failure to carry out sensitivity tests on the patient. Dr. Pillay, who was the only other medical witness called by the defence, also doubted that tests are reliable. Nevertheless, he agreed that "the history of the patient should have been taken before injection."

What the defence appeared to have been unable to appreciate was that I was not in the least concerned with the doctor's failure to carry out sensitivity tests. The negligence did not lie in the omission to carry out such tests on the patient for individual idiosyncracy. The essence of the negligence here was the failure to take

the simple, elementary precaution of asking a few questions. Had he done so, the mishap would not have happened.

I should have thought that some probing at least into every patient's history was the very first thing any doctor would start with on seeing a patient. The doctor here was guilty of negligence by his omission to do so. It is quite irrelevant that up to 1960 doctors in government and municipal hospitals habitually gave injections without tests. What could have been relevant was evidence that it was accepted practice among government doctors throughout the country that the patients' history was never probed before prescribing a penicillin injection. I doubt that any doctor in government service can be found to testify in court to this effect. In this respect, there was no question of viewing this 1960 case through 1964 spectacles.

By way of gilding the lily, perhaps, it is not out of place to point out that one doctor at least in the government service — which in practice was said never to have carried out sensitivity tests before 1960 — took enough precautions in April 1958 on the very same patient which enabled him to discover her allergy as he noted it on her out-patient card. He exercised the standard of care which he must have thought necessary. Dr. Devadason did not, and his failure unquestionably was negligence.

As to general damages, I awarded $8,000 to the deceased's son and $1,500 to her mother: for special damage $750. Until notice of appeal is given against the quantum of my award I do not propose to dilate on this subject.

Order accordingly.

SOCFIN CO. LTD. v. CHAIRMAN, KLANG TOWN COUNCIL

[O.C.J. (Ong J.) July 8, 1964]

[K.L. — Originating Motion No. 18 of 1963]

Rating — Above-ground storage tanks — Tanks resting on pre-cast concrete pillars and reinforced concrete raft — Whether raft means platform — Whether rateable as 'building' or 'structure' — Whether rateable as land — Whether they enhance value of holding — Town Boards Enactment (Cap. 137), s. 2.

The respondent in determining the annual value of the appellant's holdings for rating took into account the bulk storage tanks standing thereon. The storage tanks were used for storing palm oil and they were vertical cylinders resting on pre-cast concrete pillars which stood freely on a reinforced concrete platform foundation. The tanks themselves consisted of pre-cast bottom, side and roof steel plates which were assembled and riveted on site to form the bulk storage tanks. The platform foundation rested on prepared ground.

The appellant's contended that the tanks were not rateable since they were neither "land" nor "building".

Held: (1) the storage tanks were buildings, being structures connected with platforms and pillars and were accordingly rateable;

(2) the storage tanks were annexed to the land for its better use and enjoyment and formed part of it and accordingly rateable;

(3) the storage tanks enhanced the value of the holdings on which they stood and as they were not machinery used for industrial purposes under section 2 of the said Enactment they were accordingly rateable on this ground also.

Cases referred to:—

(1) *Shell Company of the Federation of Malaya Ltd.* v. *Commissioner of the Federal Capital of Kuala Lumpur* [1964] M.L.J. 302.

(2) *Shell-Mex & B.P. Ltd.* v. *Clayton (Valuation Officer)* [1961] R.V.R. 357.

(3) *Shell-Mex & B.P. Ltd.* v. *Childa (Valuation Officer)* [1962] E.G.R. 939.

(4) *Clayton* v. *Good, Havercraft & Co. Ltd.* [1961] R.V.R. 6.

(5) *Reid* v. *Smith* (1906) 3 C.L.R. 656, 672.

(6) *Ward* v. *Taylor* [1901] 1 Ch. 523 at p. 541.

MOTION.

A. L. Hills for the appellants.

L. P. Thean for the respondent.

Cur. Adv. Vult.

Ong J.: This is an appeal against the rating assessment imposed by the Chairman of the Klang Town Council on the appellant's holdings in Port Swettenham. The Socfin Company's contention is that, in assessing the annual value of their holdings, no account should have been taken of the bulk storage tanks standing thereon because nothing is rateable which is not land or buildings.

The holding is thus described by Mr. C. H. Williams, chartered surveyor, in his report:

"On this site there are 13 bulk storage tanks, the subject of this appeal and also three godowns, an office and ancillary buildings which have also been assessed and to which no objection has been made. The storage tanks are used for storing palm oil and they are vertical cylinders resting on pre-cast concrete pillars which stand freely on a reinforced concrete raft foundation. The tanks themselves consist of pre-cast bottom, side and roof steel plates which are assembled and riveted on site to form the bulk storage tanks. The raft foundation merely rests on prepared ground. Details of the sizes of the tanks which are identical, are as follows:

Capacity in tons	.. ..	500
Diameter in feet	.. ..	39' 4 7/16"
Height in feet	.. .. ..	17' 6 23/32"

A network of pipe lines is connected to the tanks. These pipes are joined together with nuts and bolts and can be disconnected from the tanks and taken away in lengths. The tanks are occassionally jacked up for re-setting to a proper level and the levelling-up is done by means of timber wedges.

The pipes are attached to the tanks by bolts and nuts and lead to a larger common pipe which passes through the pump-house to allow railway wagons to empty their palm oil into the tanks. The same set of pipes is used